SUPREME COURT, U. S.

APR 8

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1510

LOUIS B. PACHECO and
JOHN N. FOUNTAIN, JR.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARNOLD D. LEVINE of
LEVINE, FREEDMAN & HIRSCH, P.A.
725 East Kennedy Boulevard
Tampa, Florida 33602

Attorneys for Petitioner

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	29
APPENDIX	A-1
ORDER OF TRIAL COURT, Dated October 10, 1973	A 2-6
ORDER OF TRIAL COURT ENTERED NUNC PRO TUNC, May 24, 1972	A 7-13
OPINION OF THE COURT OF APPEALS FOR FIFTH CIRCUIT	A 14-38
ORDER OF THE COURT OF APPEALS FOR FIFTH CIRCUIT	A 39
EXCERPTS FROM THE RECORD ON APPEAL	A 40-113
CERTIFICATE OF SERVICE	A 114

CITATIONS

CASES	Page
Alexander v. United States, 336 F.2d 910 (U.S.D.C. 1964)	27
Application of United States, 427 F.2d 639 (9th Cir. 1970)	24
Augenblich v. United States, 337 F.2d 586. 601 (U.S. Ct. Cl. 1967)	27
Bell v. United States, 349 U.S. 81 (1955)	13
Callanan v. United States, 364 U.S. 587 (1961)	13
Campbell v. United States, 365 U.S. 85 (1961)	28
Elkins v. United States, 364 U.S. 2065 (1968)	20
Gebardi v. United States, 287 U.S. 112 (1932)	10
Grunewald v. United States, 353 U.S. 391 (1957)	11
Hunter v. United States, 478 F.2d 1019 (7th Cir. 1973, cert. denied 1974)	10, 11
Killian v. United States, 368 U.S. 231 (1961)	28
Ladner v. United States, 358 U.S. 169 (1958)	13
Pinkerton v. United States, 328 U.S. 640 (1946)	10
United States v. Becker, 461 F.2d 230 (2nd Cir. 1970)	14
United States v. Bobo, 477 F.2d 974 (4th Cir. 1973)	14

CITATIONS—Continued

CASES — Page

United States v. Dietrich, 126 Fed 664 (C.C. Neb. 1904) 10

United States v. Greenberg, 334 F.Supp. 1092 (N.D. Ohio, 1971) 10

United States v. Iannelli, 477 F.2d 999 (3rd Cir. 1973) 14

United States v. Jones, 360 F.2d 92 (C.A. N.Y. 1966) 27

United States v. King, 335 F.Supp. 523 (S.D. Calif. 1971) 22,24

United States v. Leta, 332 F.Supp. 1357 (M.D. Pa. 1971) 22

United States v. Lonardo, 350 F.2d 523 (6th Cir. 1965) 28

United States v. Pachecho, 489 F.2d 554 (5th Cir. 1974) 1

United States v. Perillo, 333 F.Supp. 914 (D. Del. 1971) 23, 24

United States v. Roberts, 455 F.2d 930 (5th Cir. 1971) 16

United States v. Sklaroff, 323 F.Supp. 296 (S.D. Fla. 1971) 23

CONSTITUTION

Constitution of the United States, Amendment XIV 3

CITATIONS—Continued

Page

STATUTES

18 U.S.C. § 2 ..... 5, 9
18 U.S.C. § 371 5
18 U.S.C. § 1955 ..... 2, 5, 9, 11, 13, 14
18 U.S.C. § 2518(3)(c) 2, 4, 18, 21
18 U.S.C. § 3500(b)(d) 3, 4, 8, 25, 31
28 U.S.C. § 1254(1) 2

MISCELLANEOUS

Congressional Record, Vol. 115, No. 136, P. 3 24
U.S. Code Cong. Admin. News 2190 (1968) 22, 24
The Manual for Conduct of Electronic Surveillance Under Title III 22, 23

TEXT

Anderson, 1. Wharton's Criminal Law and Procedure, Sec. 89 (1957) 10
2 F. Wharton, Criminal Law § 1604 (12th Edition 1932) 6

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1510

LOUIS B. PACHECO and
JOHN N. FOUNTAIN, JR.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Louis B. Pacheco and John N. Fountain, Jr., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, whereby that Court affirmed the convictions of the Defendants after a jury trial.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported in 489 F.2d 554 (1974). The Order denying the Petition for Rehearing filed in behalf of both Petitioners herein appears in the Appendix hereto (A-39).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 8, 1974. A timely filed Petition for Rehearing was denied on March 7, 1974, and this Petition for Writ of Certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented by this case are as follows:

I.

DOES THE APPLICATION OF "WHARTON'S RULE" PROHIBIT THE UNITED STATES OF AMERICA FROM CHARGING AND THEREAFTER PROSECUTING AN INDIVIDUAL FOR VIOLATING TITLE 18, U.S.C. § 371 AND TITLE 18 U.S.C. 1955, 2?

II.

WHETHER THE COURT ERRED IN ADMITTING IN EVIDENCE WIRE INTERCEPTS 71-07 AND 71-07(A) (FOX TAPS) DUE TO THE PROSECUTOR'S INTENTIONAL SUPPRESSION OF INFORMATION REGARDING THE ACTIVITIES OF A SIGNIFICANT CONFIDENTIAL INFORMANT FROM THE AFFIDAVIT USED TO OBTAIN THE WIRE INTERCEPT ORDER WHICH AFFIDAVIT THEREBY FAILED TO SATISFY THE REQUIREMENTS OF TITLE 18, § 2518 (3)(c)?

III.

WHETHER THE COURT ERRED IN DENYING THE MOTION TO STRIKE THE KEY

PROSECUTION WITNESS' TESTIMONY IN ACCORDANCE WITH THE PROVISIONS OF TITLE 18 § 3500(d) WHEN:

1. AFTER INDICTMENT OF PETITIONERS THE WITNESS WAS INTERVIEWED BY AN FBI AGENT TWO (2) OR THREE (3) TIMES FOR TWO (2) TO THREE (3) HOURS EACH TIME.

2. EACH SUCH INTERVIEW WAS MECHANICALLY RECORDED ON TAPE.

3. BEFORE THE TRIAL HEREIN THE PROSECUTOR DIRECTED THE DESTRUCTION OF THE TAPE RECORDINGS.

4. THE RECORDINGS WERE NEVER TRANSCRIBED IN WHOLE OR IN PART.

5. THE INTERVIEWS RELATED TO THE WITNESS' DIRECT EXAMINATION DURING THE TRIAL.

6. PETITIONERS WERE NEVER PROVIDED WITH A VERBATIM OR SUBSTANTIALLY VERBATIM TRANSCRIPT OR MEMORANDUM OF THE INTERVIEWS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

Section 1. Privileges and immunities.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

18 U.S.C. § 2518. *Procedure for interception of wire or oral communications.*

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

* * *

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous?"

18 U.S.C. § 3500. *Demands for production of statements and reports of witnesses.*

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any

statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

"(d) If the United States elects not to comply wih an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

* * *

"(a) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or"

STATEMENT OF THE CASE

Petitioners, Louis B. Pacheco and John N. Fountain, Jr., were tried by a jury after indictment and found and adjudged guilty of violation of Title 18 § 371 and Title 18, § 1955, U.S.C. Mr. Pacheco was sentenced to a probationary term, and Mr. Fountain was sentenced to a six-month term in jail to be followed by a probationary term.

Petitioners were indicted on two Counts with violation of Title 18, U.S.C., §2, §371 and §1955. The Indictment consisted of 31 pages.

During the course of pre-trial proceedings, Petitioners, through their respective attorneys, moved to dismiss the conspiracy count of the Indictment, or, in the alternative, require the Government to elect on which count it would proceed to trial contending that the Indictment as drawn violated "Wharton's Rule." 2*F. Wharton, Criminal Law* § 1604, at 1862 (12th Edition 1932). The Court denied the aforesaid motions and Petitioners proceeded to trial on all Counts of the Indictment. Petitioners raised before the Fifth Circuit Court of Appeals the aforesaid contentions, but said Court rejected same and affirmed the convictions.

During the course of the trial, the Government presented, over objection, recorded telephone intercepts, one of which intercepts related to the telephone of William Fox and purported to contain a conversation between Mr. Fox and Petitioner Fountain.

The intercepted telephonic communications came about as a consequence of affidavits prepared by representatives of the Florida Department of Law Enforcement that were presented to Governor Askew, who applied to Justice Adkins, Florida Supreme Court, for an order authorizing the intercepts which orders from time to time were issued. The last order relating to the "Fox Tap" was entered on October 1, 1971, and said tap terminated on October 27, 1971, at which time many of the Defendants charged in the Indictment were arrested.

In the application to Justice Adkins, there was an affidavit prepared that stated, amongst other things, that all usual investigative techniques had been used or accomplished.

Prior to the preparation and submission of the affidavit, on September 18, 1971, for the "Fox Tap" the affiant on said affidavit, together with representatives

of the Florida Department of Law Enforcement, met with the Federal prosecuting officials, namely, Bernard Dempsey, an Assistant United States Attorney, and Philip Smith, FBI agent, at which time a request was made by the state officials for the Federal Government to take over the contemplated prosecution of the persons who were the subject matter of the state investigation. Shortly after the aforesaid request, and before the execution of the affidavit for the "Fox Tap," the state officials were advised by Mr. Dempsey that the Federal Government would take over the prosecution of the persons under investigation, and as evidenced by the proceedings below that was forthcoming and accomplished.

From about July, 1971, up until October, 1971, Beverly Mathews, who appeared as a key prosecution witness herein, who was a confidant, lover and bookkeeper of the principal Defendant, Harlan Blackburn, acted as an informant, in regard to the matters that ultimately were the subject matter of the Indictment herein, for Philip Smith, FBI agent and Bernard Dempsey, Assistant United States Attorney, and the fact that she was acting in that capacity, providing tangible evidence to the FBI and the prosecutor's office, aside from reporting to said persons, was purportedly never made known to the officials of the Florida Department of Law Enforcement. Accordingly, in the affidavit for the "Fox Tap" presented to Justice Adkins there was never any disclosure of the role being played and information being furnished by Beverly Mathews, although as previously indicated prior to the time of the preparation of that application and execution of that affidavit, the Federal officials had agreed to take over the prosecution of this matter and immediately proceeded so to do.

At all times material to these proceedings, Beverly Mathews was available as a witness to the Federal Government, and when she was first specifically asked to appear as a witness for the Federal Government against the Defendants, she readily agreed to do so.

In December, 1971, after the Indictment of Petitioners and their arrests, and after Mrs. Mathews had agreed to appear as a witness for the Federal Government, she was interviewed by Philip Smith, FBI agent, who tape recorded two or three interviews with her, which interviews each lasted two to three hours. The reason given for the procedure followed by Mr. Smith was that Mrs. Mathews was providing so much information in such great detail and so fast that he was unable to, by hand, record everything she had to say. Prior to the time of trial, the prosecutor herein, Mr. Dempsey, directed the erasure of the tapes, although the tape recordings had not been transcribed, in whole or in part, and the erasure of the tapes and the destruction of the interview as directed by the Federal prosecutor, was not consistent with the usual procedures followed by the Federal Bureau of Investigation. All that was provided to counsel for Petitioners herein under the requirements of Title 18, U.S.C. § 3500, were some notes made by Mr. Smith during the course of the aforesaid taped interviews, that in no way purported to be a substantially verbatim transcript of those interviews, nor did said reports contain the language of the witness Mathews, in whole or in part.

REASONS FOR GRANTING THE WRIT

The qualification for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingly fulfilled by the case at bar.

I.

The holding of the trial court and of the Court of Appeals that "Wharton's Rule" is inapplicable to Indictments charging both a violation of Title 18 U.S.C. § 1955, and Title 18, U.S.C. § 371, is not only in conflict with the decision of another Court of Appeals and a District Court, but is also, in effect, an invitation to this Court to decide an important question of Federal Law which has not but should be decided by this Court.

May the Government charge and prosecute five or more Defendants with a conspiracy to conduct an illegal gambling business in violation of Title 18 U.S.C. § 1955, and also charge the same Defendants and prosecute them with the substantive offense of conducting an illegal gambling business in violation of Title 18, U.S.C. § 1955 and § 2?

Section 1955, Title 18, U.S.C., requires the concerted action of five *or more* persons to constitute an illegal gambling business. The statute is quoted as follows:

"(b) As used in this Section -

(1) 'illegal gambling business' means a gambling business which -

(i) is a violation of the law of a state or political subdivision in which it is conducted;

(ii) *involves five or more persons* who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." (Emphasis supplied.)

This Court has consistently recognized the rule that the commission of substantive offense, and a conspiracy to commit it are separate and distinct offenses. See *Pinkerton v. United States,* 328 U.S. 640 (1946). Petitioners urged before the trial court and before the Fifth Circuit Court of Appeals that an important exception to this doctrine is the rule of law commonly known as "Wharton's Rule." This rule is stated as follows:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."

Anderson, 1. *Wharton's Criminal Law and Procedure,* Section 89, page 191 (1957).

The theory behind the rule is that where certain crimes require the concerted action of two persons these persons cannot be charged with conspiracy to commit the offense. The conspiracy is such an integral part of the substantive offense or is merged into the substantive offense so that the two cannot be considered separate offenses. See *Gebardi v. United States,* 287 U.S. 112 (1932); *United States v. Dietrich,* 126 Fed. 664, 667 (C.C. Neb. 1904). To charge the defendants with both the substantive crime and the conspiracy to commit the crime would be grossly improper for the substantive offense cannot in law or fact be committed without a conspiracy. Thus, conspiracy is an inherent element of the substantive crime and in keeping with the dictates of due process of law should not be made an additional crime. *Hunter v. United States,* 478 F.2d 1019 (7th Cir. 1973, cert. denied U.S. Sup. Ct. 1974); *United States v. Greenberg,* 334 F.Supp. 1092 (N.D. Ohio 1971).

Conspiracies are made punishable because of the increased danger involved in a group offense. A conspiracy is a separate crime because it is felt that when two or more persons combine to accomplish a criminal purpose, the added element of combination is sufficiently evil to be punished separately. Irrespective of the foregoing and the recognition generally of the appropriateness of charging defendants with substantive offenses and conspiracies, this Court has stated that it will view with disfavor attempts to broaden the scope of conspiracy prosecutions. *Grunewald v. United States*, 353 U.S. 391 (1957). When considered in this context, "Wharton's Rule" presents itself as a logical limitation on the use of conspiracy charges by prosecutors when that conspiracy charge is coupled with the substantive offense set out in Title 13, U.S.C. § 1955.

In *United States v. Hunter*, 478 F.2d 1019, 1025 (1973), the Court applied "Wharton's Rule" and held the defendants therein could not be charged with a conspiracy to violate § 1955. The Court stated:

> ". . . Both multi-person situations fell within Judge Learned Hand's statement that 'when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal acton of the conspirators indicted, they may not be indicted for conspiring to commit it if they have in fact consummated it. This is because the crime presuppose their mutual agreement which was therefore a part of it' *United States v. Center Veal & Beef Co.*, 162 F.2d 766, 770 (2d Cir. 1947)
>
> "In his earlier opinion in United States v. Zeuli, 137 F.2d 845, 846 (2d Cir. 1943), Judge Hand had summarized the rule as follows:

'Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. *United States v. Dietrich, C.C.Neb.,* 126 F. 664 (Van Devanter and Munger, JJ.); *United States v. New York Central & H. H. R. R. Co.,* C.C., 146 F. 298 (Holt, D. J.); *United States v. Sager,* 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. *United States v. Katz,* 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986; *Gebardi v. United States,* 287 U.S. 112, 122, 53 S.Ct. 35, 77 L.Ed. 206, 84 *A.L.R. 370.* Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy. The indictment was not so confined; it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them. Such a conspiracy was not within the doctrine we have just mentioned, for it covered more than the crime of receiving.'

" In the case before us, both alleged offenses require 'the mutual cooperation' or the 'recriprocal action' of a plurality of persons. The conspiracy charged in Count I is confined to the transactions described in Count II as a violation of § 1955; the conspiracy covers nothing more than the substantive crime committed by the conspirators. There is no suggestion that the proof of intent required for the violation of § 1955 is any different from the evidence required to sustain the charge of conspiracy."

". . . We find 'no ingredient in the conspiracy (charged in Count I) which is not present in the completed crime (charged in Count II).' *Pinkerton v. United States*, 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489."

Applicable rules of statutory interpretation must be given force and effect when dealing with the question herein. Under the "rule of lenity", *Bell v. United States*, 349 U.S. 81 (1955), all ambiguities in penal statutes must be resolved in favor of a defendant. "This policy of lenity means that the Court will not interpret a Federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 168 (1958).

Although this Court in *Callanan v. United States*, 364 U.S. 587 (1961), did not apply the rule of lenity in regard to a conspiracy, the significant dictum of the Court on page 597 should be given meaning and effect herein:

> "Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution . . . *nor is it an open question whether conspiracy and its substantive aim merged into a single offense.*" (Emphasis added.)

Applying the aforesaid legal principles, the ambiguity found herein should be resolved in favor of the Defendants.

The Government contended in the trial court and before the Court of Appeals that the five-person requirement in § 1955 is a mere jurisdictional element of

the crime and does not go to the essence of the offense itself. This argument has been accepted not only by the Fifth Circuit Court of Appeals, but also in the case of *United States v. Becker*, 461 F.2d 230 (2d Cir. 1970); *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); and *United States v. Iannelli*, 477 F.2d 999 (3rd Cir. 1973).

An essential element in the Government's case, under § 1955 and in the case below, was that five or more persons were involved in the gambling business. Thus, group activity is a necessary element of the offense and an individual proprietorship of a gambling activity would not fall within the ambit of this statute. Once the "five person requirement" was put in the statute, for whatever purpose, this requirement becomes a requisite and necessary element to prove the crime of group activity. A group conspiracy is a necessary prerequisite to the commission of the substantive offense by any one of the Defendants charged including Petitioners. It is to this precise situation to which "Wharton's Rule" directs itself, and its application dictated a dismissal of the conspiracy charge and the elimination of evidence admitted against Petitioners under said charge.

II.

In Holding that the trial court did not err in admitting into evidence the "Fox Taps" irrespective of the prosecutor's intentional suppression of information to be included in the Affidavit used to obtain the wire intercept order, which Affidavit therefore did not comply with the requirements of Title 18, U.S.C. Section 2518 (31(c), the Appellate Court rendered a decision in conflict withe decisions of other District Courts, but it also, in effect, extended an invitation to this Court to decide an important question of Federal law, which has not been but should be decided by this Court.

A Motion to Compel the Disclosure of All Evidence Favorable to Defendants was timely filed in the trial court and an Order was entered granting said motion.

Irrespective of the foregoing, prior to the inception of the trial, there was never disclosed to any of the Defendants the fact that Beverly Mathews had been acting as a Federal informant since June 1971.

Pursuant to timely Motions to Suppress, testimony was taken by the Court to consider the priority of the circumstances of the issuance of the Court-ordered wiretaps, and on March 30, 1972, the Court entered an Order denying the suppression motions, and subsequently, by Order dated October 10, 1972, a Supplemental Order was entered denying the several Motions to Suppress (which gave effect to a hearing before the Court at Jacksonville, Florida, on April 20, 1972).

The Order of the Court of October 10, 1972, (A. 2-6) made certain findings:

> "The state in this case had sufficient information about the initial wiretap subjects to realize that a large scale lottery operation was being conducted, which, by its very nature, necessarily involved a hierarchal conspiracy. *The Defendants point to no evidence that was available to the state through normal investigative techniques to pierce the veil of the conspiracy.*"

The aforesaid finding was shown by an evidentary hearing to be wholly inaccurate.

During the trial, Beverly Mathews took the witness stand in behalf of the government and then, *for the first time*, it became apparent that she started to work as an informant for the FBI in June of 1971 (App. pg. 40-43)

She continued in that capacity up until the time that she testified at trial (App. pg. 40-43). The relationship between Beverly Mathews and the person against whom the initial intercept was directed, namely, Harlan A. Blackburn, was that of lover, secretary, confidant, and general partner in the criminal activities engaged in by Mr. Blackburn (App. pg. 43-63, 64, 65).

After Mr. Blackburn was in the marshall's custody as a result of a Federal conviction (during the course of which he was hospitalized), Mrs. Mathews received communication from him relating to his criminal activities in written form and otherwise, which documents she made available to the FBI and the prosecutor by either providing them with the original said documentation or copies thereof. (App. pg. 66-70).

Mrs. Mathews was prosecuted by the prosecutor in this case, Bernard Dempsey, for perjury and received a 5-year sentence from which an appeal was taken. *United States v. Roberts,* 455 F.2d 930 (5th Cir. 1971). At about the time that the Fifth Circuit Court of Appeals affirmed the conviction, Mrs. Mathews (Roberts) decided to become a Federal informant and contacted FBI Agent Philip Smith. At that time, she made a request to be advised who might adequately represent her in connection with her appellate proceedings and any matters relating to possible reduction of sentence. (App. pg. 71-77).

The FBI agent who was receiving the information from this confidential informant inquired of the prosecutor, Bernard Dempsey, who he might suggest to be the best attorney to suit the needs and purposes of the informant. A recommendation was made by Mr. Dempsey and said attorney was immediately thereafter retained by Mrs. Mathews (App. pg. 71-77, 78-80).

Mr. Stichter, a former Assistant United States Attorney, filed a Petition for Writ of Certiorari in this Court and after this was denied he and Mr. Dempsey advised the sentencing judge of the cooperation of Mrs. Mathews with the Federal government; and, as a consequence, she received a 90-day sentence at Alderson Virginia (App. pg. 65, 73-78).

While all of the foregoing was occurring, the Florida Department of Law Enforcement (hereinafter referred to and identified as "FDLE") was conducting an investigation into the gambling activities of William Fox and Harlan Blackburn. As a consequence of this and incidental thereto, certain applications for wire intercepts were sought and obtained. (App. pg. 79-84, 85-86). It should be noted that an FBI informant furnished part of the information that led to the issuance of one of the wire tap warrants (App. pg. 87). In September, 1971, the agents in charge of the FDLE, together with their counsel, approached Bernard Dempsey and FBI Agent Philip Smith with a view in mind of having the Federal government take over the continued and further investigation of Mr. Blackburn and Mr. Fox and their associates, and to prosecute federally all persons who may be criminally involved with them. (App. pg. 79-84, 87-95, 86, 87, 95-100, 85, 86).

Shortly after the meeting, a decision was made by the Department of Justice and the FBI agreeing to take over the investigation and prosecution on a federal level of all people involved with Mr. Blackburn and Mr. Fox, and that decision was communicated to the FDLE and their attorneys. (App. pg. 100-104).

Subsequent to the decision hereinabove set forth and the communication of advice to proceed on a Federal basis, the last applications for a wiretap warrant

on the William Fox phones were sought. (App. pg. 101-108). A representative of FDLE certified to Justice Adkins consistent with the requirements of Title 18, Section 2518 (3) (c), in regard to the employment of normal investigative procedures and their lack of success in which Affidavit he did not make any reference whatsoever to Beverly Mathews, the substantial number of tangible documents ultimately introduced in evidence she had provided nor the many oral incriminatory statements she had made to the FBI and the prosecutor. As a matter of fact, said Affidavits simply stated that normal investigative procedures had been tried and had failed, or reasonably appeared to be unlikely to succeed if tried. In light of the role played by Mrs. Mathews prior to preparation of the Affidavit in question said Affidavit was false. To contend that Mrs. Mathews was not available as a witness and ready and willing to appear as a witness in any Federal prosecution is ludicrous as the record in the proceedings below reflects.

"Q. Mrs. Matthews, you related to us in the past two days that sometime before July of 1971 when you became an FBI informant, as a result of a contact that you made to Phil Smith?

A. Yes, sir.

Q. From the FBI' is that right?

A. Yes, sir.

. . . .

Q. Then from time to time an informant — from time to time you met over a period of weeks or months in order to unburden yourself to him of all of the past activities that you had been involved in?

"A. I told him everything that I knew, yes, sir.

. . . .

Q. In August of 1971, didn't you have occasion to meet with the prosecutor, Mr. Dempsey, and Mr. Smith?

A. Yes. After I talked to Mr. Smith, I believe — I don't know what his conversation was with Mr. Dempsey, but the two of them then would meet with me.

Q. You had already been prosecuted by Mr. Dempsey some months before?

A. Yes, sir.

. . . .

Q. Did you know whether or not they were developing a case for prosecution against the people you had spoken about?

A. I just was kind of working under cover and giving them information. I really wasn't too concerned what they were doing with it.

Q. Now, could you tell me when it was that the first discussion was had, if it ever was had, as to whether or not you would appear as a witness against any of the people whom you were giving information about this matter? I am not talking about other matters, but —

"THE COURT: He wants to know when was the first time you ever discussed with Mr. Dempsey and Mr. Smith the possibility of being a witness against these defendants.

A. I don't know the exact time — as this case progressed? I told them any way I could help them, I would, I don't remember the time.

Q. Therefore, are you telling me that if your services were needed in any respect that you were willing to cooperate and participate in behalf of the Government?

A. Yes, sir.

"Q. You were concerned, you were frightened, but you were still willing to cooperate and participate in any way you were needed so to do?

" Yes, sir."

All of the witnesses presented by Petitioner in connection with the Motion to Suppress the Introduction Into Evidence of the "Fox Tap" agree that the first time Beverly Mathews was asked to testify as a government witness against the Defendants, she agreed (App. pg. 82, 103-112).

It is interesting to note that the question was posed to her contemporaneous with termination of the "Fox Tap" on or about October 27. 1971, when the Defendants were arrested on the Indictment for which they were ultimately prosecuted.

There can be no doubt of the fact that if the Affidavit for the "Fox Tap" was prepared by a Federal Agent or employee in light of the facts known to the FBI and to the United States' Attorney's Office, and that Affidavit did not disclose the nature and extent of the availability of information provided by Mrs. Mathews, the falsity of that Affidavit would unquestionably result in a suppression of the intercepted telephone communications arising from the warrant issued pursuant to the application.

In the case of *Elkins v. United States,* 80 Sup. Ct. 1437, 364 U.S. 2065 (1960), this Court was concerned with an issue that is analogous to the problem herein presented. This Court found that the rule excluding in Federal criminal prosecutions evidence obtained by Federal Agents in violation of a Defendant's constitutional rights was:

> ". . . calculated to prevent, not to repair, its purpose is to deter — to compel respect for constitutional guarantee in the only effective available way — by removing the incentive to disregard it."

This Court adopted the reasoning of Justice Jackson who discussed the considerations to be given to evidence obtained in violation of constitutional guarantees:

> "Courts can protect the innocent against such invasions indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Brinegar v. United States,* 338 U.S. 106, 181, 69 Sup. Ct. 1302, 1313, 93 L.Ed. 1879, dissenting opinion.

and then concluded that state police actions are to be governed by Federal standards:

> "Evidence obtained by state officers during a search which if conducted by Federal officers, would have violated Defendant's immunity from unreasonable search and seizure under the Fourth Amendment is inadmissible over the Defendant's timely objection in a Federal criminal trial . . .
> "The test is one of Federal law neither enlarged by what one state court may have countenanced nor diminished by what another may have suppressed."

Viewed in the context of the law above cited, we then turn to the requirements of Title 18, U.S.C., Section 2518 (3) (c), to determine whether or not the statutory provisions dictating the minimum requirements that must be complied with before a wiretap warrant will issue by a Federal Judge is present in this case. The legislative history concerning need to tap is set out in 1968 *U.S.C. Cong. Admin. News* 2190:

"Subparagraph (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous. This requirement is patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary. Compare Report of the Committee of Councillors Appointed to Inquire into the Interception of Communication, par 64 (1957); *Read v. Case,* 4 Conn. 166 (1822). The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aerial surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants and the infiltration or conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. See *Giancana v. United States,* 352 F.2d 921 (7th, certiorari denied, 86 S. Ct. 437, 382 U.S. 959 (1965); *New York v. Saperstein,* 2 N.Y. 2d 210, 140 N.E. 2d 252 (1957). What the provision envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States v. Ventresca,* 85 S. Ct. 741, 380 U.S. 102 (1965)." 1968 U.S. Code Cong. Adm. News 2190.

The Manual for Conduct of Electronic Surveillance Under Title III prepared by the Justice Department for the use of its attorneys states at page 18 that "interception under Title III is to be considered an investigative tool of last resort." *U.S. v. King,* 335 F. Supp. 523 (S.D. Calif. 1971).

In *United States v. Leta,* 332 F. Supp. 1357 (M.D. Pa. 1971), the Court found need for wiretap justified by specific averments conforming to the strict requirements of law where it was stated as follows:

"1. Confidential informants described categorically refused to testify in open court.

"2. Without the testimony of the above-mentioned informants, it would be impossible to prove the interstate nature of the current gambling operation of Anthony Leta.

"3. The location of Leta's two headquarters make execution of a search warrant a dubious enterprise, it being virtually impossible to approach either location without being observed by persons used as lookouts.

"4. There are no known witnesses who could be relied upon to testify truthfully to the violations in question.

"5. Due to the manner in which the violations are carried out, the interception of these communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove these violations."

In the instant case, there are no averments as to confidential informant's refusing to testify; difficulty in execution of search warrants or lack of known witnesses. The need to wiretap was not established as required by Title III. See *United States v. Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971) and *United States v. Perillo*, 333 F. Supp. 914, 921 (D. Del. 1971), where the Court states:

> "Even if all these conditions were met, however, the issuing magistrate cannot authorize a wiretap unless he also finds that normal investigative procedures have either failed, previously, appear unlikely to work subsequently, or seem too dangerous to attempt. *This extra protection of privacy, above and beyond that required by the Fourth Amendment, manifests the intention of the framers of the*

statute to ensure that each wiretap would be not only reasonable, but also necessary. These statutory sections cited show that applications for wiretaps must be narrow in scope and limited to objects to be seized before an order authorizing the interceptions of a wire communication will issue." (Emphasis ours).

Perillo, supra, expresses the concern of Senator McClellan found in his report to President Nixon as reported in Vol. 115, *Cong. Record No.* 136, page 3.

It is submitted that Senator McClellan's fears were realized in the "Fox Tap" since these were used as a shortcut or substitute for other investigative techniques and not after exhaustion of such techniques. There was no need.

Unquestionably, the exhaustion requirement was not made a part of the statutory framework to foreclose the use of electronic surveillance until law enforcement officials had exhausted every possible means of obtaining evidence against potential defendants, but it was inserted to permit the authorizing judge to be fully conversant with the nature and progress of the investigation and the difficulties, if any, in the use of normal investigatory techniques. 1968 U.S. Code C and A News, 2190; *United States v. King,* 335 F. Supp. 523 (S.D. Calif. 1971).

The trial court by order entered *nunc pro tunc* May 24, 1972 (App. 7-13) denied Petitioner's Motion to Suppress and the Appellate Court affirmed the action of the trial court although it should have suppressed the communications and evidence derived therefrom since the statute, even if constitutional, must be strictly and narrowly construed. *Application of United States,* 427 F.2d 639 (9th Cir. 1970).

III.

The holding that tape recordings made of interviews with a Government witness by an agent of the Federal Bureau of Investigation are not within the ambit and scope of Title 18, U.S.C. § 3500 and producible to the Defendants at trial after the witness in question testifies not only is in conflict with other appellate decisions and decisions of this Court, but is also, in effect, an invitation to this Court to decide an important question of Federal law.

As a result of pre-trial proceedings in this cause, the Court directed that all "Jencks Act Statements" be produced in advance of trial. The Government substantially complied with this order except for statements of Beverly Mathews which were not produced until such time as she took the witness stand to testify. During the course of Mrs. Mathews' testimony, a question relating to the suppression of wire intercepts was considered by the Court, during the course of which Petitioners learned for the first time that Mrs. Mathews had been interviewed by FBI agents on two or three occasions, which interviews were mechanically recorded on tape. (App. 111, 112). These tape interviews were erased pursuant to the directions of the Assistant U.S. Attorney conducting the investigation and the ultimate prosecution of this case, Bernard H. Dempsey, although the interviews came at a point in time when Mrs. Mathews, an FBI informant, had already agreed to act as a Government's witness (App. p. 112), and after Petitioners herein had been indicted. The tapes in question have never been transcribed. (App. p. 112).

Title 18, U.S.C. § 3500, in part, provides as follows:
"... (e) The term 'statement' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

". . .

"(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; . . ."

The prosecutor advised the FBI agent conducting the interviews to tape Mrs. Mathews ". . . because of the fact that Mrs. Roberts (Mathews) was speaking so rapidly and providing so much information, and he was having difficulty in getting everything that was meaningful down, and he was somewhat frustrated, and the best way to go about getting everything she had to say down was to use a tape recorder."

It must be noted that the reports of the tape interviews with Mrs. Mathews that were provided to counsel pursuant to motion at the conclusion of her testimony did not reflect in anyway that said notes and reports either came from an interview that was taped or in any way related to the taped interviews. (App. 112, 113).

The FBI report of the taped interviews did not purport to quote Mrs. Mathews, nor did they purport to relate her language or the terms she used, but simply in summary fashion and form attempted to present the agents general recollection of the substance of the interview.

All trial counsel know that it is one thing to attempt to impeach a critical witness with third party records (FBI reports that do not purport to quote a witness) versus a signed statement or tape recording of the witness where the precise language and terminology of the witness is contained. The distinction be-

tween that which was made available for use in cross-examination and that which existed until such time as the prosecutor directed the destruction of the tape recordings should be obvious and that type of distinction was noted by the Court in *Augenblick v. United States,* 377 F.2d 586, 601 (U.S. Ct. of Cl. 1967).

There is authority that would support the good faith destruction of statements of witnesses. Those cases generally deal with the normal administrative practice, the typical situation being an FBI agent taking personal notes during the course of an interview and then using those notes as a predicate for dictating his report, the substance of the notes being embodied in his report, and as a consequence the destruction of said original notes would be and has been deemed to be a good faith destruction and not violative of the provisions of the "Jencks Act." *Alexander v. U.S.,* 336 F.2d 910 (U.S.D.C. 1964); *U.S. v. Jones,* 360 F.2d 92 (C.A.N.Y. 1966). The significant consideration that the trial court and the appellate court failed to take into consideration in determining the propriety of the actions of the prosecutor herein are as follows:

> (1) Had the defendants been arrested and/or charged at the time of the taped interviews? Yes. The arrest of most of the defendants occurred on or about October 27, 1971, and the Indictment was returned on November 1, 1971. (App. p. 106)
>
> (2) Had a decision been made to use the party interviewed as a witness against the Defendants? Yes. The transcript reflects the following: 'That was after you knew that she had already agreed to be a witness in this case, and the subject matter of those tapes related to some aspect of what she testified to here; is that right? A. That's right.' (App. p. 112).

(3) Were the reports made available to counsel for petitioners a verbatim or substantially verbatim transcript of the taped interviews? No. The transcript of the proceedings shows the following: "Do you know whether or not those tapes were produced in typed form or otherwise verbatim? A. I know they were not. You asked if there was a transcript of the tapes. There is none. There are no taped verbatim statements." (App. p. 112). Each of the taped interviews lasted from two to three hours (App. p. 113) and all that the agent did to prepare his report of those interviews was to listen to the tapes and correlate those with the notes that he had made during the course of the interviews and then dictate his report to a stenographer.

(4) Did the destruction of the tapes come about as a result of participation and directions from persons actively participating in the investigation and prosecution of these matters? Yes. Bernard Dempsey, the Assistant United States Attorney, directed that the tapes be made and then erased and that procedure was followed by FBI agent, Philip Smith. (App. p. 111, 112).

Although good faith destruction of "Jencks Act Statements" has been approved, there is no authority that would permit the nature and type of conduct perpetrated against Petitioners in this case. As a matter of fact, the authorities in that regard consistently dictate that sanctions are to be imposed upon the prosecution for its failure to produce "Jencks Act Statements," the burden being on the Government to establish the propriety of its conduct. *United States v. Lonardo,* 350 F.2d 523 (6th Cir. 1965); *Campbell v. United States,* 365 U.S. 85 (1961); *Killian v. United States,* 368 U.S. 231 (1961).

The *Court of Appeals* dealing with this issue stated at page 920. as follows:

". . . Similarly, the tape recordings made in this case were clearly not within the scope of the Jencks Act."

The aforesaid pronouncement by the Fifth Circuit Court of Appeals is clearly wrong, and the failure of the trial court to strike the testimony of Mrs. Mathews in light of the acts of the prosecuting officials in this case depriving Petitioners of the benefit of her taped statements and the sanctioning of that conduct by the appellate court requires this Court to, once and for all, lay the question to rest.

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent. The matters involved are of extreme general and national significance. The questions presented have not been, but should properly be, conclusively determined by this Court. The holdings below cannot be reconciled with those of this Court, other Courts of Appeals and District Courts.

The maintenance of uniformity in the administration of criminal justice in the Federal Courts is jeopardized by the decision below. For all of the reasons listed above, it is most strenuously urged that this Court exercise its discretion and grant the Writ.

/s/ Arnold D. Levine
ARNOLD D. LEVINE
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorney for Petitioners